APPEAL NO. 93055

On December 16, 1992, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding, to determine whether maximum medical improvement (MMI) can be presumed on the basis of respondent's having abandoned medical treatment. The hearing officer found that respondent (claimant) had not abandoned her medical treatment, concluded that claimant cannot be presumed to have reached MMI because of abandonment of medical treatment, and ordered the resumption of the payment of temporary income benefits (TIBS) to claimant. The hearing officer also found that the report of a designated doctor certified that claimant reached MMI on November 16, 1992, with an 11% whole body impairment rating. However, the hearing officer concluded that the designated doctor's report was against the great weight of the other medical evidence. Appellant (carrier) appeals from the order and challenges the sufficiency of the evidence to support the determination that claimant has not reached MMI. Claimant filed no response.

DECISION

Having reviewed the record, we are unable to determine whether the designated doctor certified that claimant reached MMI and we reverse and remand for further development of the evidence.

According to the benefit review conference (BRC) report, signed on August 26, 1992, claimant failed to attend the BRC held on August 24, 1992, to mediate the disputed issue of "[w]hether [MMI] can be presumed to have been reached on the basis of abandonment of medical treatment." The benefit review officer (BRO) recommended that claimant "has apparently abandoned all medical treatment" and entered an interlocutory order suspending the payment of TIBS as of August 24, 1992. Carrier took the position at the BRC that claimant missed a required medical examination scheduled in December (1991), last saw a doctor on February 27, 1992, attended physical therapy (PT) until early April 1992, and failed to respond to carrier's numerous certified letters. Carrier also took the position that a Medical Status Request letter was requested of the Texas Workers' Compensation Commission (Commission), that such letter was sent by the Commission to claimant's treating doctor, and that the treating doctor failed to respond. (Article 8308-10.07(c)(3) provides administrative penalties for health care providers who intentionally or wilfully fail or refuse to timely file required reports.) The BRO instructed carrier to reschedule the "required medical examination" (RME) and also indicated the Commission would schedule a designated doctor examination.

Article 8308-4.23(g) provides that the Commission shall adopt rules establishing a presumption that MMI has been reached based on a lack of medical improvement in the employee's condition. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4(b) (Rule 130.4(b)) provides a procedure for a workers' compensation insurance carrier to resolve whether an employee has reached MMI when MMI has not been certified by a doctor. To invoke the procedure, the carrier shall presume an employee has reached MMI if, among

other things, the treating doctor has examined the employee at least twice for the same compensable injury, the number of days between the examinations is greater than 60, the examinations were held after TIBS began to accrue, and the treating doctor's medical reports filed with the carrier for all examinations and reports conducted after the first of the two examinations indicate a lack of medical improvement in the employee's condition from the first of the two examinations. Rule 130.4(c) provides that a carrier may also invoke the Rule 130.4 procedure if it appears the employee has failed to attend two or more consecutively scheduled health care appointments.

Carrier apparently decided to invoke the Rule 130.4 procedure prior to the BRC to determine whether claimant had reached MMI. A carrier invokes the procedure by notifying the Commission in writing and requesting that it send to the treating doctor a "Medical Status Request" letter, together with a Report of Medical Evaluation (TWCC-69) form, asking the treating doctor whether MMI has been reached, and whether the employee has failed to attend two or more consecutively scheduled appointments. The treating doctor is required to complete the TWCC-69 no later than seven days after receipt. If the treating doctor fails to respond, or certifies that MMI has not been reached, the carrier may request a BRC on either the ground of apparent lack of improvement in the employee's medical condition or the employee's failure to attend health care appointments. The carrier must include with its request for a BRC either a request for an RME examination or a request for the Commission to appoint a designated doctor if an agreement with the employee is not reached (Rule 130.4(i)), and the Commission then orders that either the RME or the designated doctor examination be conducted. (Rule 130.4(k)). The BRC may be cancelled by the Commission without prejudice if the doctor certifies that the employee has not reached MMI. The BRC may also be cancelled by agreement of the parties when a designated doctor certifies that an employee has reached MMI. Rule 130.4(l). Rule 130.4(m) then provides that if a BRC is held, the BRO shall presume that the finding of the designated doctor is correct unless there is information, statements, or medical reports that clearly and convincingly rebut a determination of MMI. Rule 130.4(n) provides for suspension of TIBS by the BRO, depending upon the BRO's recommendations.

We view the Rule 130.4 MMI resolution procedure, and in particular Rules 130.4(l), (m), and (n), as contemplating that in the absence of an agreement of the parties accepting the designated doctor's report, such report would first be considered by the parties and the BRO at a BRC, and, if necessary, be weighed by the BRO in the formulation of the recommendations required by Article 8308-6.15(d). We also note that Rule 141.2(a) authorizes the rescheduling of BRCs.

It appears in this case that after the Commission's designated doctor, Dr. C (Dr. C), examined claimant on November 16, 1992, and forwarded the TWCC-69 (purporting to show MMI being reached as of November 16, 1992, with an 11% impairment rating) to the Commission, the dispute went straight to the CCH.

Though the hearing record is silent as to such matters, carrier, in its request for review, states that the contested case hearing was originally set for October 23, 1992, that it was continued to December 16th to await the report of Dr. C, and that Dr. C's TWCC-69 was received the day of the hearing. The record does not indicate when claimant may have received a copy of Dr. C's TWCC-69.

Carrier introduced the TWCC-69 and there is no appealed issue regarding the scope of the disputed issue. However, we have had occasion to observe that the "presumption" of MMI as stated in Rule 130.4 cannot result in a true presumption of MMI, but rather serves merely to invoke the MMI resolution process of Rule 130.4. *See* Texas Workers' Compensation Commission Appeal No. 92389, decided September 16, 1992; Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992; and Texas Workers' Compensation Commission Appeal No. 92671, decided February 3, 1993.

Claimant testified that she had worked for carrier for 12 years as a materials clerk. On March 21, 1991, at about 7:30 a.m., claimant was walking in the mall area of the school where she worked when she slipped and fell, hitting her head and left body on a wall and ending up with her left leg folded in a sitting position. At about 10:00 a.m., she went to see (Dr. P) because she was experiencing sharp pain in her back. She said she had had a slip and fall accident about 10 or 12 years earlier and experienced the same symptoms. Dr. P referred her to (Dr. RP) whom she saw on April 5, 1991, and who prescribed physical therapy (PT). Claimant said she attended the prescribed PT sessions every day for several months. However, her mother suffered a stroke on June 17, 1992, and claimant was unable to attend PT sessions during the June-August 1992 period as she had to care for her mother in claimant's home. Claimant did not testify respecting her receipt of PT between the summer of 1991 and the summer of 1992. Claimant said she saw Dr. RP on September 23, 1992, missed a November 19, 1992 appointment, and had an appointment scheduled for January 7, 1993. She said she needed to see Dr. RP again to get her status sorted out; that he still has not released her to return to work; that he is concerned with swelling in her cervical and lumbar spine regions; and that he wanted her to have more PT at her last visit in September 1992 but that carrier denied the benefits. Claimant said Dr. RP has not told her what he plans to do in the future but she understands he does plan further treatment. He just told her to go to therapy and see what happens after that. Respecting her not going to PT in September 1992 and Dr. RP's notes about it, claimant said she did not attend PT sessions because either her car was broken or she had no money for gas, or she was taking care of her mother. She said she sometimes limps, has swelling in her neck and mid-back, has burning sensations, knifelike pains, and numbness in her back, left leg and hip, is unable to stand for long periods, and treats herself with heat and rest.

According to Dr. RP's records, introduced by claimant, he first saw claimant on April

5, 1991. His orthopedic examination of claimant's lumbosacral spine revealed pain with limitation of motion and spastic paravertebral muscles present; however, the neurological exam was within normal limits. Dr. RP had performed a lumbar laminectomy on claimant over 15 years earlier and x-rays revealed the fusion with some arthritic changes in the area. His treatment plan included PT, ultrasound, heating pad, massage, exercise, and medications. Dr. RP took claimant off work until her next appointment. On April 29, 1991, Dr. RP noted severe pain of the lumbosacral spine with radiation to the lower extremities with neurological problems. He feared claimant had developed a new herniated lumbar disc and requested an MRI test. On May 30, 1991, Dr. RP noted the MRI revealed "a full bulge of the L5 (sic) disc without any herniation," no change from claimant's last evaluation, and he continued conservative treatment and PT. The MRI report of May 13, 1991 noted a bulge at the L3-L4 level, without herniation, and decreased signal intensity at the L5-S1 level due to disc degeneration. Claimant missed her June 14, 1991 appointment. On September 26, 1991, Dr. RP noted that claimant continued with back pain without any neurological deficits. He continued the conservative treatment plan and noted she had not been seen for a long period of time as she "gone north with her family." Dr. RP next saw claimant on December 10, 1991, and continued the conservative treatment plan, noting that work hardening will be done in the future for full rehabilitation. On February 27, 1992, Dr. RP noted claimant's continued back pain, maintained her conservative treatment plan, and indicated claimant may need a myelogram to rule out further pathology. Dr. RP's June 30, 1992 report stated that he had not seen claimant for four months, that he had previously sent her to PT but she had not gone, and he continued her conservative treatment plan.

Dr. RP's report of September 3, 1992 stated the following:

> The patient was evaluated today. She never went to physical therapy which complicates everything. She is not doing very well. The patient needs to have full rehabilitation but without physical therapy and work hardening I doubt that anything can be done. It is up to the insurance company to decide what they want done.

Dr. RP again continued claimant's conservative treatment plan. On September 22, 1992, Dr. RP completed a statement for claimant's credit union disability insurance claim which stated that her injury was "lumbosacral syndrome," that she was unable to work, and that her release date to return to work was undetermined. Dr. RP's prognosis on the reports of claimant's last four visits was "guarded."

The hearing officer found, based on certain evidence which he specified, that claimant "had not and has not abandoned medical treatment," and concluded that she cannot be presumed to have reached MMI because of abandonment of medical treatment, referencing Article 8308-4.23(g) and Rules 130.4(b) and (c). As our previously cited decisions make clear, the "presumption" of MMI stated in Rule 130.4 serves only to invoke

the MMI resolution procedures of that rule. Once the BRO recommended that the Rule 130.4 procedures were indeed invoked by such "presumption," the Rule 130.4 procedures were set in motion to lead to the resolution of the ultimate issue of MMI

through a doctor's certification. *See* Texas Workers' Compensation Commission Appeal Nos. 92389, 92456, and 92671, *supra.*

As for the evidence relating to the issue of whether claimant had reached MMI based upon Dr. C's report, carrier introduced a TWCC-69, dictated by Dr. C, which stated that claimant visited him on November 16, 1992. Dr. C stated the following: ". . . at the present time the patient has plateaued in her condition and probably has persistent symptoms due to disk degeneration. Because of the two-level disk degeneration and the previous history of back surgery and fusion, the patient will have a permanent disability of 11%. If symptoms persist, a repeat MRI may be needed."

The hearing officer arrived at the following factual finding and legal conclusions with regard to claimant's having been certified by Dr. C to have reached MMI on November 16, 1992, with an 11 % impairment rating:

FINDINGS OF FACT

11.The designated doctor certified [MMI] on November 16,1992 with an 11% impairment rating based on examinations which showed that the Claimant

a). walked with a limp,

b). had numbness as a neurological deficit and

c). had limitation of her range of spine motion because of pain.

CONCLUSIONS OF LAW

3.The Claimant's continuing symptoms from her March 21, 1991 injury and her need for additional medical treatment indicate that she has not reached the point after which further material recovery from or lasting improvement to her injury can no longer reasonably be anticipated. Tex. Rev. Civ. Stat. Ann. article 8308-1.03(32)(A).

5.The report of the designated doctor is not entitled to presumptive weight because the great weight of the other medical evidence, the Claimant's deficits found by the designated doctor, the Claimant's need for continuing medical treatment, the Claimant's treating doctor not certifying [MMI] and the Claimant's continued symptoms, is to the contrary. Tex. Rev. Civ. Stat. Ann., art. 8308-4.25(b).

Having decided that claimant had not reached MMI, the hearing officer ordered the reinstatement of claimant's TIBS from August 24, 1992, the effective date of the BRO's interlocutory order which suspended TIBS.

We note the TWCC-69, in Item 14 (for MMI), stated the date of November 16, 1992, and assigned a whole body impairment rating of 11%. However, neither the "no" nor "yes" block in Item 14 was checked in answer to the question whether MMI was reached. Presumably, because a date was entered, a "yes" answer was intended. This can be determined by the hearing officer on remand. Of much graver consequence is the stamped statement on the TWCC-69 that the report was "dictated [by Dr. C] but not read," and that it was "subject to dictation and transcription variance." The TWCC-69 appears to bear a facsimile signature of Dr. C. We have provided guidance in past decisions concerning the requirements for the "certification" of MMI. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991, and Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. With respect to the TWCC-69 dictated but not read (and therefore presumably not signed) by Dr. C, we have previously observed that Rule 130.1(c)(4) requires the doctor's signature in order for there to be a certification of MMI. Texas Workers' Compensation Commission Appeal No. 92027, decided May 27, 1992; Texas Workers' Compensation Commission Appeal No. 92165, *supra*. Because of our inability to determine whether the TWCC-69 was signed by Dr. C, an essential requirement for a certification of MMI, we must remand for the development of additional evidence. The hearing officer should note that the Appeals Panel has indicated in the past that the Commission, before rejecting a designated doctor's report for lack of Rule 130.1 information that is readily obtainable, should seek clarification from the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992.

While we will await the new decision after remand before reviewing the correctness of the hearing officer's determination that the presumptive weight of the designated doctor's report was rebutted by the great weight of the other medical evidence, we are concerned with the hearing officer's apparent reliance, in part, on the claimant's testimony. A claimant's lay testimony does not constitute medical evidence that may be considered in determining whether the "great weight" rebuts the presumptive weight. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

Certain other observations respecting the report of a designated doctor and the presumptive weight accorded such reports by the legislature are also in order. In Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, we considered that Articles 8308-4.25 and 4.26 accord a designated doctor's opinion (on MMI and impairment rating) presumptive weight "unless the great weight of the other medical evidence is to the contrary," and said "it is not just equally balancing evidence or a preponderance of evidence that can outweigh such report, but only the ‘great weight’ of other medical evidence that can overcome it." We also noted our previous emphasis of the unique position a designated doctor's report occupies under the 1989 Act, and that no other doctor's report is accorded such special, presumptive status. In Texas Workers'

Compensation Commission Appeal No. 93007, decided February 18, 1993, we reversed the hearing officer's determination that the presumptive weight of the designated doctor's report was rebutted by the great weight of the other medical evidence, and noted that only the great weight of other medical evidence can overcome the presumptive weight of the designated doctor's report. We have also emphasized that the achievement of MMI does not necessarily equate to a pain free recovery or to the claimant's being restored to the preinjury condition. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993; Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992; Texas Workers' Compensation Commission Appeal No. 93007, *supra.* A hearing officer who rejects a designated doctor's report because the great weight of the other medical evidence is to the contrary must clearly detail the evidence relevant to his or her consideration, clearly state why the great weight of the other medical evidence is to the contrary, and further state how the contrary evidence outweighs the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92690, decided February 8, 1993. *And see* Texas Workers' Compensation Commission Appeal No.92570, decided December 14, 1992.

The decision of the hearing officer is reversed and the case is remanded for the expedited development of further evidence, as appropriate, and for reconsideration and such additional findings as are appropriate and not inconsistent with this opinion. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Worker's

Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Thomas A. Knapp
Appeals Judge